United States Court of Appeals

for the Second Circuit

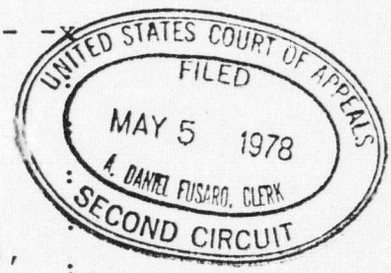
PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NOS. 136, 144 - - SEPTEMBER TERM 1977

DOCKET NOS. 77-7183, 77-7186



EDWARD S. REDINGTON, As Trustee for the liquidation of the business of Weis Securities, Inc. and SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiffs-Appellants,

- against -

TOUCHE ROSS & CO.,

Defendant-Appellee.

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

ROSENMAN COLIN FREUND LEWIS & COHEN
Attorneys for Defendant-Appellee
575 Madison Avenue
New York, New York 10022
212-644-7000

Arnold I. Roth
Eugene Zemp DuBose, Jr.
Arthur S. Linker
Of Counsel

TABLE OF CONTENTS

	Page
Statement Of The Case.....	2
Reasons For Granting Rehearing And For Rehearing In Banc.....	3
I. THE MAJORITY MISAPPREHENDS THE STATUTORY SCHEME OF THE 1934 ACT AND THE CONTROLLING SUPREME COURT DECISIONS, AND ERRONEOUSLY HOLDS THAT SECTION 17 CREATES AN IMPLIED PRIVATE RIGHT OF ACTION.....	3
A. The Statutory Structure Of The 1934 Act, Analyzed In Light Of The Pertinent Supreme Court Decisions, Demonstrates A Clear Congressional Intent That Section 18 Provide The Sole Remedy For Section 17 Violations.....	4
B. The Majority Misapprehends, And Improperly Analyzes, The Significance of Section 18.....	7
II. THE MAJORITY MISAPPREHENDS OR OVERLOOKS THIS COURT'S DECISION IN LANK v. NEW YORK STOCK EXCHANGE, THE SUPREME COURT'S DECISION IN CAPLIN v. MARINE MIDLAND GRACE TRUST CO. AND OTHER AUTHORITIES, AND ERRONEOUSLY HOLDS THAT THE TRUSTEE AND SIPC MAY SEEK RECOVERY OF CUSTOMERS' DAMAGES UNDER SECTION 17.....	12
A. The Majority Errs As To The Trustee.....	13
B. The Majority Errs As To SIPC.....	14
Conclusion.....	15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD S. REDINGTON, as Trustee for the liquidation of the business of Weis Securities, Inc., and SECURITIES INVESTOR PROTECTION CORPORATION,	:	Nos. 136, 144 September Term, 1977
Plaintiffs-Appellants,	:	Docket Nos. 77-7183 77-7186
- against -	:	
TOUCHE ROSS & CO.,	:	
Defendant-Appellee.	:	

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

Defendant-appellee Touche Ross & Co. ("Touche Ross") petitions for rehearing, pursuant to Rule 40, F.R.App.P., and suggests rehearing in banc, pursuant to Rule 35, F.R.App.P., of those portions of this Court's decision filed April 21, 1978 (Lumbard and Timbers, CJJ.; Mulligan CJ., dissenting), which hold that

1. Section 17 of the Securities Exchange Act of 1934 (the "1934 Act") creates an implied private right of action for brokerage firm customers against accountants who audit the firm's allegedly misleading financial statements;

2. Plaintiff-appellant Securities Investor Protection Corporation ("SIPC") is subrogated to, and may assert, such implied right of action of those customers whose claims in the liquidation of the brokerage firm pursuant to the Securities Investor Protection Act of 1970 ("SIPA") have been paid by SIPC; and

3. Plaintiff-appellant Redington, as Trustee for the liquidation of the business of Weis Securities , Inc. (the "Trustee"), as bailee, may assert such implied right of action on behalf of those customers whose property he cannot return and whose claims have not been satisfied by SIPC.

Statement Of The Case

This action arises out of the SIPA liquidation of the brokerage firm, Weis Securities, Inc. ("Weis"), and seeks aggregate damages of over $65,000,000 from Touche Ross, a firm of certified public accountants which audited Weis' financial statements dated as of May 26, 1972, and filed with regulatory entities pursuant to Section 17 of the 1934 Act. According to the complaint, the financial statements were misstated by officers of Weis, the Touche Ross audit was defective in not discovering the misstatements, and the Weis liquidation (which commenced in May 1973) and the damages of the Trustee and SIPC resulted therefrom. The Trustee and SIPC each assert (i) purported federal claims based on Section 17, and (ii) purported common law claims.

On Touche Ross' motion, Judge Wyatt below dismissed (i) the federal claims on the ground that Section 17 does not create any implied right of action, and (ii) the common law claims for lack of subject matter jurisdiction. This Court, in the majority decision of Judges Lumbard and Timbers as to which rehearing in banc is here sought, and over the vigorous dissent of Judge Mulligan, reversed Judge Wyatt's decision.

The Reasons For Granting Rehearing And For Rehearing in Banc

I. THE MAJORITY MISAPPREHENDS THE STATUTORY SCHEME OF THE 1934 ACT AND THE CONTROLLING SUPREME COURT DECISIONS, AND ERRONEOUSLY HOLDS THAT SECTION 17 CREATES AN IMPLIED PRIVATE RIGHT OF ACTION.

Rehearing is required here because the majority, misapprehending the consequences of a statutory scheme which provides both a reporting requirement (Section 17 of the 1934 Act) and a limited express remedy for violations thereof (Section 18), and misapprehending the controlling Supreme Court decisions with respect to whether a statutory provision for which an express remedy is provided also gives rise to another and broader implied remedy, erroneously holds that Section 17 does create such an implied remedy. Rehearing in banc should be granted because the majority decision (the first such decision in the approximately 44 years of Section 17's existence) is (i) one of exceptional importance in the administration and enforcement of the federal securities laws,* and (ii) inconsistent with other decisions

---

* Among other reasons, the majority decision creates a new right of action which is likely to add substantially to the caseloads of the federal courts generally and, since federal securities litigation is heavily centered in New York, to that of the already burdened Southern District of New York. Demonstrating that such a prospect is not idle speculation, on April 27, 1978, only 6 days after the Court's decision herein, alleged customers of Weis commenced in the Southern District a purported class action against Touche Ross alleging violations of Section 17. Rosen v. Touche Ross & Co. (S.D.N.Y. 78 Civ. 1943). Moreover, it demonstrates the unnecessary nature of the burden placed upon the federal court by the majority's creation of the Section 17 right of action to point out that not only do the Weis customers also have pending New York State court actions against Touche Ross for damages allegedly resulting from the Weis situation, Rosen v. Touche Ross & Co. (Sup. Ct. N.Y. County, Index No. 21572/77) and Rich v. Touche Ross & Co. (Sup. Ct. N.Y. County, Index No. 23193/76), but the Trustee and SIPC also have a pending New York State court action against Touche Ross which was commenced almost a year prior to, and is virtually identical to this action, Redington and Securities Investors Protection Corp. v. Touche Ross & Co. (Sup. Ct. N.Y. County Index No. 13996/76).

(one of which was affirmed without opinion by this Court, and one by the Third Circuit) (see p. 5 n., infra), and such rehearing is necessary to secure uniformity of decisions.

A. The Statutory Structure Of The 1934 Act, Analyzed In Light Of The Pertinent Supreme Court Decisions, Demonstrates A Clear Congressional Intent That Section 18 Provide The Sole Remedy For Section 17 Violations.

1. Section 17, as in effect in 1972, required broker-dealers (e.g., Weis) to "make such reports, as the [SEC] by its rules and regulations may prescribe" (emphasis added). 15 U.S.C. § 78q(a). SEC Rule 17a-5 implements Section 17 and in 1972 required the filing of certain audited financial statements.

2. Section 18 is entitled "Liability for Misleading Statements" and provides an express damage remedy for misstatements "in any . . . report, or document filed pursuant to [the 1934 Act] or any rule or regulation thereunder" to persons "who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement" (emphasis added). 15 U.S.C. § 78r(a).

3. Of course, the Trustee and SIPC were not purchasers or sellers of securities, and therefore could assert no claim for the express Section 18 remedy. Consequently, they were forced -- in order to find a federal basis for their damage claims -- to assert alleged implied rights of action under Section 17.

4. However, Section 18's express, and carefully limited, damage remedy for misstatements in Section 17 reports necessarily reflects a Congressional intention that a damage

remedy for such misstatements would be available only as provided in Section 18 -- i.e., where a person purchased or sold a security in reliance upon the misstatements -- and that no other damage remedy for such misstatements (e.g., a damage remedy for brokerage firm customers who neither purchased nor sold securities in reliance thereon) was intended or could be implied. As Judge Mulligan correctly observes in his dissent, "Judge Wyatt correctly found and, indeed, common sense would dictate, that section 18(a) expressly provides the sole private remedy which Congress intended to be available for a violation of section 17(a) and the other reporting sections" (emphasis added) (Slip Op. 2728). Indeed, with respect to the other reporting provisions of the 1934 Act (e.g., §§ 13(a), 13(d), 15(d), 15 U.S.C. §§ 78m(a), 78m(d), 78o(d)), numerous decisions in this Circuit and others already have held that such provisions do not, in view of the express remedy provided by Section 18, create any implied private rights of action.*

5. As Judge Mulligan's dissent also correctly observes, such an analysis accords with -- indeed, is required by -- Supreme Court decisions explicitly directing that, where a

* E.g., Myers v. American Leisure Time Enterprises, Inc., 402 F. Supp. 213 (S.D.N.Y. 1975), aff'd without opinion, 538 F.2d 312 (2d Cir. 1976); In re Penn Central Securities Litigation, 347 F. Supp. 1327 (E.D. Pa. 1972), relevant point adhered to on reargument, 357 F.Supp. 869 (E.D. Pa. 1973), aff'd, 494 F.2d 528 (3d Cir. 1974); DeWitt v. American Stock Transfer Co., CCH Fed. Sec. L. Rep. ¶ 96,089 (S.D.N.Y. 1977); Levy v. Johnson, CCH Fed. Sec. L. Rep. ¶ 95,899 (S.D.N.Y. 1977); Meer v. United Brands Co.,CCH Fed. Sec. L. Rep. ¶ 95,648 (S.D. N.Y. 1976); In re Equity Funding Corp. of America Securities Litigation, 416 F. Supp. 161, 190 (C.D. Cal. 1976); McLaughlin v. Campbell, 410 F.Supp. 1321 (D. Mass. 1976); duPont v. Wyly, 61 F.R.D. 615 (D. Del. 1973).

remedy is sought to be implied from a statutory provision for which a limited express remedy already is provided, the doctrine "forbiddingly known as 'expressio unius est exclusio alterius'" is to be applied (Slip Op. 2729-2730). For example, National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458 (1974) ("Amtrak"), unequivocally directs that

> "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' . . . This principle of statutory construction reflects an ancient maxim -- expressio unius est exclusio alterius. Since the Act creates . . . a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created . . . are the exclusive means to enforce the duties and obligations imposed by the Act".

See also, e.g., Securities Investor Protection Corporation v. Barbour, 421 U.S. 412, 419 (1975) (reiterating the "observation [in Amtrak] that express statutory provisions for one form of proceeding ordinarily implies that no other means of enforcement was intended by the legislature").*

6. Of course, the Supreme Court did not direct inflexible application of the expressio unius doctrine, pointing out in Amtrak that it must "yield to clear contrary evidence of legislative intent." 414 U.S. at 458. Here, however, even the majority

---

* Cf. Abrahamson v. Fleschner, 568 F.2d 862, 875 (2d Cir. 1977) petition for cert. filed, 46 U.S.L.W. 3588 (U.S. Sup. Ct., March 14, 1978) ("Had Congress provided explicitly for private damage actions it would be unnecessary to consider whether the remedy should be judicially implied"). As Judge Mulligan noted, "[t]his conclusion in Abrahamson is in fact strongly supportive of the analysis in this dissent" (Slip Op. 2731 n. 4).

recognizes the absence of such "clear contrary evidence", conceding that there is "no indication, either in the [1934 Act] itself or in its legislative history, of any congressional intent . . . to create a private remedy under Section 17", and that "[t]he legislative history . . . is mute on the issue" (Slip Op. 2713-2714, see also 2730-2731 (dissent)).

7. The Supreme Court also recently emphasized with respect to the 1934 Act itself the impropriety of implying broader remedies than the express statutory remedies specifically provided. Thus, in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734, 736 (1975), the Supreme Court, after noting that "[w]hen Congress wished to provide a remedy [under the 1934 Act] to those who neither purchase nor sell securities, it had little trouble in doing so expressly" and after specifically discussing Section 18 itself, pointed out that "[i]t would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action" (emphasis added). Of course, the majority decision here, by finding an implied right of action under Section 17 broader than the express Section Section 18 remedy, creates precisely the "anomaly" which Blue Chip Stamps held was impermissible (see Slip Op. 2731-2733 (dissent)).

B. The Majority Misapprehends, And Improperly Analyzes, The Significance Of Section 18.

1. The majority plainly misapprehends the foregoing in holding that Section 17 creates an implied damage remedy.

2. The majority's basic error is its failure to apply the analysis required by Amtrak, Barbour and Blue Chip Stamps to this case, where there already exists an express remedy (Section 18) for violations of tne statutory provision (Section 17) under which an implied remedy is sought. Under that analysis, the Court is required first to recognize the existence of the express remedy of Section 18, then to consider Sections 17 and 18 in light of the exclusio unius doctrine, and finally to apply the doctrine to bar an implied remedy under Section 17 in the conceded absence of "clear contrary evidence of legislative intent". However, the majority instead purports first to analyze Section 17, and to determine whether it creates an implied remedy, without any consideration of Section 18 (Slip Op. 2710-2716). Only after concluding that there is such an implied remedy does the majority finally give cursory consideration to Section 18, and then only to assert that it does not detract from the existence of such a remedy (Slip Op. 2716-2717). Of course, as Amtrak, Barbour and Blue Chip Stamps make clear, that approach is based upon the patently erroneous view that Section 18 is in no way indicative of the Congressional intent as to whether Section 17 creates an implied remedy -- a view which the majority acknowledges holding by its express admission that "[w]e find no indication . . . in the statute itself . . . of any congressional intent either to create a private remedy under Section 17 or to deny one" (emphasis added) (Slip Op. 2713-2714).

3. The majority's argument for ignoring Section 18 is that customers of brokerage firms are "members of a class peculiarly

protected by Section 17" and "are favored wards of Section 17", that Section 18's express remedy will normally not be available to such customers, and therefore that "[w]e cannot agree that Congress simultaneously sought to protect a class and deprived the class of the means of protection" (Slip Op. 2712-2713, 2716).* However, the majority's conclusion simply does not follow from its premises. Even assuming with the majority that Section 17 was specifically intended to protect brokerage customers, whereas Section 18 was intended to provide rights only to purchasers and sellers, the existence of Section 18 necessarily demonstrates a further Congressional intent that the purchasers and sellers referred to therein be the only class with a damage remedy for misstatements in Section 17 reports. If, in enacting the 1934 Act, Congress was as aware of, and consciously concerned with protecting, both brokerage firm customers (its "favored wards" in Section 17, according to the majority) and purchasers and sellers (to whom it provided Section 18's express damage remedy), the withholding of an express damage remedy from the customers, while at the same time giving

---

* The majority clearly overstates the issue when it says that customers will be "deprived . . . of the means of protection" (Slip Op. 2716) without an implied right of action under Section 17. As Judge Mulligan spells out in detail (Slip Op. 2733-2738), brokerage customers have many "protections", including the preventive monitoring of brokerage firms by the SEC and the New York Stock Exchange, the existence of SIPC (after 1970), the deterrent effect of criminal and injunctive proceedings, and the availability of state law remedies. Thus, the issue here is not whether to grant the customers a Section 17 implied remedy or else to leave them without any protection, but rather whether to add to the protections they already have the additional protection of a Section 17 implied remedy which Congress itself intentionally refused to provide.

such a remedy to the purchasers and sellers, can only mean that Congress consciously intended that the customers not have a damage remedy and that their protection be provided in a different way. As Judge Mulligan correctly puts it,

> "if the brokers' customers were so clearly the concern of the Congress when it enacted section 17(a), its failure to afford them a private damage remedy in section 18(a), which was contemporaneously enacted and which provides a private remedy for misleading statements in reports filed pursuant to the mandate of the Act, leads to the conclusion that Congress did not intend a private damage remedy to be available to brokers' customers" (Slip Op. 2729).

4. Consistent with its effort to ignore Section 18, the majority purports to find a Section 17 implied right of action by consideration of the factors set forth in Cort v. Ash, 422 U.S. 66 (1975). However, since Section 18 does provide an express remedy, and since the Cort decision expressly limits its own relevance to "determining whether a private remedy is implicit in a statute not expressly providing one" (emphasis added), 422 U.S. at 78,* Judge Mulligan properly found that the Cort factors "afford an inappropriate analytical framework" here (Slip Op. 2739, see also 2726-2727, 2728-2729). And even if the Cort factors were assumed to be relevant here despite the existence of Section 18, the majority's analysis of the issue in terms

* Identical language is used to describe the Cort factors in Piper v. Chris Craft Industries, Inc., 430 U.S. 1, 37 (1977). Moreover, J.I. Case Co. v. Borak, 377 U.S. 426 (1964), a case heavily relied upon by the majority despite the fact that it "has been significantly restricted by more recent decisions of the Supreme Court" (Slip Op. 2726 and n. 2), also involved a situation where no express remedy whatsoever had been provided for violations of the statutory provision as to which an implied remedy was asserted. This aspect of Borak was emphasized in Piper ("the relevant provisions are silent as to remedies" -- 430 U.S at 25).

of those factors still cannot be accepted because, among other errors, that analysis does not at any point consider the significance of Section 18 (see Slip Op. 2711-2716).*

4. In its Cort analysis, the majority also errs in failing to consider the additional factor, articulated in Piper v. Chris Craft Industries, Inc., 430 U.S. 1, 25-26 (1977), that a private damage remedy is to be implied only where it is "necessary to effectuate Congress' goals" (emphasis added). As the detailed analysis set forth by Judge Mulligan demonstrates (Slip Op. 2733-2739), there is and can be "no showing here that a private damage remedy against accountants is necessary to vindicate the primary congressional purpose embodied in Section 17(a)". Cf. Lank v. New York Stock Exchange, 548 F.2d 61, 65 (2d Cir. 1977) (this Court, in refusing to imply a private right of action under Section 6 of the 1934 Act, pointed out that "[e]ven were we to agree . . . that granting [plaintiff] a right of action . . . would 'accord' with the purpose of the [1934] Act, our function here is to discern the intent of the Congress, not to

* Section 18 clearly bears on all four of the Cort factors. For example, it shows that purchasers and sellers, and not customers, are the class for whose special benefit any damage remedy is provided (Cort factor 1, Slip Op. 2711). Moreover, it shows a Congressional intent to limit a damage remedy to purchasers and sellers (Cort factor 2, Slip Op. 2711). Also it shows that a Section 17 implied right would be inconsistent with the legislative scheme since it would effectively abolish the limitations Congress placed on express civil remedies (Cort factor 3, Slip Op. 2712). Finally, it shows that Congress regarded any cause of action by the customers for damages to be one traditionally relegated to state law (Cort factor 4, Slip Op. 2712), a relegation which has not adversely affected the Weis customers since they have asserted their claims in New York State court actions against Touche Ross (see p. 3 n., supra; Slip Op. 2737 n. 9).

legislate in its place").*

II. THE MAJORITY MISAPPREHENDS OR OVERLOOKS THIS COURT'S DECISION IN LANK V. NEW YORK STOCK EXCHANGE, THE SUPREME COURT'S DECISION IN CAPLIN V. MARINE MIDLAND GRACE TRUST CO. AND OTHER AUTHORITIES, AND ERRONEOUSLY HOLDS THAT THE TRUSTEE AND SIPC MAY SEEK RECOVERY OF CUSTOMERS' DAMAGES UNDER SECTION 17.

The Court unanimously and correctly holds that neither the Trustee on behalf of Weis nor SIPC on its own behalf has a right of action under Section 17 because neither is an intended beneficiary thereof (Slip Op. 2717 n.13, 2718-2719, 2740). However, the majority, misapprehending or overlooking controlling decisions in this Court, the Supreme Court and elsewhere, errs in holding that the trustee as "bailee", and SIPC as "subrogee", were appropriate parties to seek recovery of customers' damages. Rehearing is required to correct that error, and rehearing in banc should be granted in order to secure uniformity of decision in this Court and because the issues are important in the administration of SIPA and the Bankruptcy Act.

---

* The majority relies heavily upon the amicus brief of the SEC (e.g., Slip Op. 2707 n. 3, 2715 n. 12, 2723-2725; cf. Slip Op. 2725-2726 n. 1 (dissent)), a brief which also purported to conclude, without considering the effect of Section 18, that Section 17 creates an implied right of action. Of course, the SEC's views are entitled to no deference here. See Piper v. Chris-Craft Industries, Inc., supra, 430 U.S. at 41 n. 27 ("Even if the [SEC] spoke with a consistent voice . . . its presumed 'expertise' in the securities law field is of limited value when the narrow legal issue is one peculiarly reserved for judicial resolution, namely whether a cause of action should implied by judicial interpretation in favor of a particular class of litigants. Indeed, in our prior cases relating to implied causes of action, the Court has understandably not invoked the 'administrative deference' rule, even when the SEC supported the result reached in the particular case"); Blue Chip Stamps v. Manor Drug Stores, supra , 431 U.S. at 759-760 and n. 4 (Powell, J., concurring).

A. The Majority Errs As To The Trustee

1. While conceding that Weis itself could have no cause of action under Section 17*, the majority finds in the Trustee's statutory duty to marshal and return to customers their property authorization to sue on behalf of customers whose property he was unable to return. In so holding, the majority misapprehends or overlooks this Court's holding in Lank v. New York Stock Exchange, 548 F.2d 61, 67 (2d Cir. 1976), that to permit a receiver of a brokerage firm to sue where the brokerage firm could not would be impermissible, even though any recovery would be for the benefit of public investors. The Court in Lank emphasized, in language clearly applicable here, that "the investors already have a cause of action in their own right . . . and the receiver's suit would add nothing to their rights." 548 F. 2d at 67.

2. The majority also overlooks the Supreme Court's holding in Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416 (1972). In Caplin, the Supreme Court held that the Chapter X trustee of a corporation had no standing to assert claims on behalf of holders of its debenture against third parties, because

> "[i] nowhere in the statutory scheme is there any suggestion that the trustee . . . is to assume the responsibility of suing third parties on behalf of debenture holders . . . . [ii]

* Were Weis itself to sue as bailee of customers' property, it would be suing to vindicate its own possessory rights as bailee, and not the rights of the customers. See generally Prosser, Law of Torts 94-95 (4th ed. 1971); Holmes, The Common Law, Lectures V & VI, 130-194 (1963 ed.); 5 N.Y. Jurisprudence, Bailment §§33-35, 117-119, particularly §118 ("The general rule is that either the bailee having a special property, or the bailor as general owner, may bring an action for the conversion or loss of, or injury to, the subject of the bailment. The right to sue is indispensable to enable each to protect his particular interest") (emphasis added) (1975 rev.).

> [the corporation] could not make any claim . . . [thus] any suit by debenture holders would not affect the interests of other parties to the reorganization . . . . [iii] a suit by him on behalf of debenture holders may be inconsistent with any independent actions that they may bring themselves." 406 U.S. at 428-434.

That reasoning also compels the conclusion here that the Trustee may not sue on behalf of Weis customers. First, as in Caplin, there is no statutory authorization for any such suit. Second, any recovery by the Trustee would be on behalf of the customers only and would be of no benefit to other general creditors, since, as in Caplin, payment by Touche Ross of customers' claims would simply subrogate Touche Ross to the customers' claims against the Weis general estate. Third, there would be a proliferation of litigation since Weis' customers can (and already have, see p. 3n., supra) sued Touche Ross; the Trustee may be unable to bind the customers to any settlement; and the Trustee would be inappropriate as the customers' class representative, since he has no common interest with them and may have conflicting interests, in view of his obligations to general creditors and others.

3. Thus, as Judge Mulligan correctly observes in his dissent, the Trustee's duty as "bailee" to return property to customers adds not "a jot or a tittle to his statutorily created status as the representative of Weis" (Slip Op. 2741).

B. The Majority Errs As To SIPC.

Although the Court unanimously holds that, pursuant to SIPA's express subrogation provision, SIPC, upon advancing funds to the Trustee to pay customers' claims, is subrogated only to those customers' claims against the Weis estate (Slip Op. 2717, 2740), the majority nevertheless erroneously concludes that SIPC -- "a

congressionally created corporation with limited powers to litigate" (Slip. Op. 2740 (dissent)) -- also somehow has subrogation rights in addition to those expressly granted to it and is thereby subrogated to the customers' alleged claims against Touche Ross under Section 17. In so concluding, the majority not only again misapprehends or overlooks the controlling effect of the Supreme Court decisions requiring application of the expressio unius doctrine (Slip. Op. 2740-2741 (dissent)), but also fails to address or distinguish an authority* which is precisely in point and cited in Judge Mulligan's dissent (Slip Op. 2740), and misconstrues another authority upon which it purports to rest its decision.**

Conclusion

Rehearing and rehearing in banc should be granted here.

May 5, 1978.

Respectfully submitted,

ARNOLD I. ROTH
EUGENE Z. DuBOSE, JR.
ARTHUR S. LINKER
Of Counsel

ROSENMAN COLIN FREUND LEWIS & COHEN
Attorneys for Defendant-Appellee
575 Madison Avenue
New York, New York 10022
212-644-7000

* Rogers v. Nat'l Surety Co., 116 Neb. 170, 216 N.W. 182 (1927) (under statute establishing a "depositor's guaranty fund", express provision subrogating such fund to the rights of creditors paid by the fund to participate in the assets of the defunct bank held, under expressio unius principle, to be fund's exclusive subrogation remedy).

** Ackerman v. Motor Vehicle Accident Idemnification Corp., 18 App.Div.2d 307, 239 N.Y.S.2d 463 (1st Dep't 1963). In Ackerman, MVAIC was required under policies of insurance to pay insureds for personal injuries inflicted by "financially irresponsible motorists," but was required by the statute to pay "qualified persons" (non-insureds) for similar injuries. The Court held that in the case of an insured person upon payment by MVAIC under the policy it became subrogated to the insured's rights against the wrongdoer, but that "[s]ince the liability of MVAIC to pay a qualified person is created by statute . . . it was necessary in the same statute . . . expressly to provide for subrogation" (emphasis added). 18 App.Div.2d at 309-310.

STATE OF NEW YORK)
SS:.
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE
BY MAIL

DOROTHY SUSSER, being duly sworn, deposes and says that she is not a party to this action and is over 18 years of age. On the 5th day of May, 1978 deponent served two copies of the annexed Petition for Rehearing and Suggestion For Rehearing in banc

upon the following named attorney(s) at the address(es) indicated by depositing true copies thereof enclosed in properly addressed postpaid wrappers in an official depository of the United States Postal Service within the State of New York:

Hughes Hubbard & Reed
One Wall Street
New York, New York 10005

Hawkins, Delafield & Wood
67 Wall Street
New York, New York 10005

Dorothy Susser
DOROTHY SUSSER

Sworn to before me this
5th day of May, 1978.

Marc Golden
NOTARY PUBLIC

MARC GOLDEN
Notary Public, State of New York
No. 31-4615406
Qualified in New York County
Commission Expires March 30, 1979